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OPINION

Corporate Punishment

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Some lawyers have been a bit wry about the penalties of the law. The American attorney F. Lee Bailey once observed that 'I have knowingly defended a number of guilty men. But the guilty never escape unscathed. My fees are sufficient punishment for anyone'.¹ None the less, punishment is the skeleton of the criminal justice system. It gives structure to the criminal law and makes it solid. Punishment is also a way of manifesting and ranking a society's league table of wrongdoing by reflecting the idea, for example, that a rapist has done something worse than a graffitist.

It is a widely shared principle that the worse the crime, the worse should be the punishment. There are many nuanced exceptions to that proposition—for example, however bad the crime of a four-year-old, we would not use the criminal justice system to punish him. In general, though, a serious crime entails a serious sentence. In light of the principle that the worse the crime, the worse the punishment, one might expect that unlawfully killing people would be among the most seriously punished offences. It certainly is where individuals commit murder or manslaughter, but where a corporation is found guilty of manslaughter it is now not certain that the culprit would, under a new sentencing guideline, receive an appropriately serious sentence.

The new sentencing guideline² should be set in its brief historical context. The first chapter of corporate manslaughter law in the UK began on 2 February 1965, but it was rather an empty chapter. *The Times* reported what was then an important innovation in English law: the first time a company had stood trial for manslaughter. But since then over 40,000 people have been killed at their work or in commercial disasters like those involving ferries and trains while prosecutions for corporate manslaughter have totalled at just 38.

The old common law made it very difficult to prosecute companies because the 'doctrine of identification' required the prosecution to pin all the blame on at least one director whose will was identified as the 'mind' of the company. As companies commonly had responsibility for safety matters distributed across more than one directorial portfolio, pinning all the blame on one person was difficult. Various directors

* The views expressed in this article are those of the author and do not necessarily reflect the views of The Open University, 36 Bedford Row, or *The Journal of Criminal Law*.

1 *Los Angeles Times*, 9 January 1972.

2 Sentencing Guidelines Council, Definitive Guideline on Corporate Manslaughter and Health and Safety Offences Causing Death, 9 February 2010, available at <http://www.sentencing-guidelines.gov.uk>, accessed 7 April 2010.

claimed to know only a fragment of the lethal danger that materialised. It was not permissible to incriminate the company by aggregating the fragmented faults of several directors.

The Corporate Manslaughter and Corporate Homicide Act 2007 aims to criminalise corporate killing without the need to find all the blame in one individual. The offence is committed where an organisation owes a duty to take reasonable care for a person's safety but the way in which its business has been 'managed or organised' amounts to a gross breach of that duty and causes death. The law says that, for a conviction, a 'substantial element' of the gross negligence must come from 'senior management' (as opposed to a maverick worker) but any company trying to evade the law by not making safety the responsibility of a senior manager would, by virtue of that very stratagem, be open to legal attack.

The Sentencing Guidelines Council's role is to promote consistent sentencing. Its new guideline for cases of corporate manslaughter, and cases where health and safety offences cause death, marks a welcome clarification of how the courts should punish companies and organisations that have committed lethal offences. The criminal law was historically developed before widespread corporate activity whereas today companies and organisations proliferate and commit significant criminal wrongdoing. The guideline is an innovative and important legal development. It does, though, appear to impose an unnecessarily weak fine tariff and will thereby lighten the seriousness of corporate killing.

If a company or organisation is convicted, the sanction is an unlimited fine, although the court is also empowered to impose a remedial order (to make the company rectify some deficiency in its operations or training) and a publicity order requiring the offender to name and shame itself.

In general, the guideline says, the amount of the fine must reflect the seriousness of the offence and the court must take into account the financial circumstances of the offender. The Court of Appeal has previously stated that although the fine should 'reflect public disquiet at the unnecessary loss of life'³ it is not possible to incorporate a financial measure of the value of human life in the fine imposed for an offence.

The guideline states that there will inevitably be a broad range of fines because of the range of seriousness involved in offences and the differences in the circumstances of the defendant corporations. The Council says 'fines must be punitive and sufficient to have an impact on the defendant'. The offence of corporate manslaughter, because it requires gross breach at a senior level, will, the Council says, mean that the appropriate fine 'will seldom be less than £500,000 and may be measured in millions of pounds'. The range of seriousness involved in health and safety offences is greater than for corporate manslaughter. However, where the offence has caused death, the guideline indicates that the appropriate fine 'will seldom be less than £100,000 and may be measured in hundreds of thousands of pounds or more'. The truth is,

3 *R v F Howe & Son (Engineers) Ltd* [1999] 2 All ER 249 at 254.

though, that some of the corporate offenders with the worst records of having been guilty of offences related to commercially caused death have turnovers of over £300 billion, so fines measured in ‘millions of pounds’ might well have a very low impact on such offenders.

It is interesting to note that the definitive guideline marks a very considerable backstep from the draft guideline. The Sentencing Advisory Panel had suggested a level of fine of between 2.5 and 10 per cent of a convicted company’s average annual turnover during the three years prior to the offence. The starting point would have been 5 per cent of turnover.⁴ Turnover is the aggregate of all money received by an organisation during the course of its business over an annual period. It is comparable with the income of an individual, which is typically the primary measure used to assess an individual offender’s ability to pay a fine. It is also the measure already used by the Office of Fair Trading when imposing financial penalties on companies that have infringed competition law.⁵ Ten per cent of global turnover is also the maximum fine the European Commission can impose for breaches of EU competition law.⁶ Such an approach to fining companies found guilty of unlawful killing would have entailed a much greater deterrent effect on potentially delinquent companies. It is no answer to point out that if the draft guideline had been applied to convicted companies with huge turnovers, the fines would have been excessive. The global turnover of some UK companies is in the order of £300 billion, so a court would have been obliged to consider a fine of £3 billion. Brehony and Daniels (*New Law Journal*, 23 January 2008, 89) highlight the preposterousness of such a fine but, in reality, a sentencing guideline is, after all, only a guideline.

The new definitive guideline states that the normal approach to sentencing should be for the court initially to consider how far serious injury was a foreseeable consequence of the company’s conduct. Next, the court should consider how far short of behaving with reasonable care the defendant fell. The court must then consider how common the kind of breach that occurred was in the organisation—how widespread was the non-compliance? Was it isolated or part of a systematic departure from good practice across the defendant’s operations? It will also be necessary to know how far up the organisation the breach went. In general, the higher up the responsibility for the breach, the more serious the offence and the heavier the punishment.

The court can then identify any particular aggravating or mitigating circumstances that might apply to stiffen or soften the punishment. Aggravating factors include causing more than one death, very grave personal injury in addition to death, failure to heed warnings or advice

4 Sentencing Advisory Panel, *Consultation on Sentencing for Corporate Manslaughter*, 15 November 2007, para. 60, available at <http://www.sentencing-guidelines.gov.uk/consultations/closed/index.html>, accessed 7 April 2010.

5 Office of Fair Trading, *OFT’s Guidance as to the Appropriate Amount of a Penalty*, 2004, available at http://www.ofi.gov.uk/shared_ofi/business_leaflets/ca98_guidelines/of423.pdf, accessed 7 April 2010, also cited in Sentencing Advisory Panel, above n. 4, fn. 73.

6 Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

from officials, employees or members of the public, cost-cutting at the expense of safety and any deliberate failure to obtain or comply with relevant licences. Mitigating factors include a good safety record, a prompt acceptance of responsibility, and a high level of cooperation with the investigation, beyond that which will always be expected.

The court will then need to consider the nature, financial organisation and resources of the defendant and consider the consequences of a fine. The court should look at the effect any corporate fine might have 'on the employment of the innocent'. The guideline says that any effect upon shareholders will, however, 'not normally be relevant' as 'those who invest in and finance a company take the risk that its management will result in financial loss'. The guideline also states that the effect on directors of a fine imposed on a company will not normally be relevant to consider. Nor would it ordinarily be relevant that the prices charged by the defendant might be raised if it were fined 'unless the defendant is a monopoly supplier of public services'.

Any fine should be calculated after all these factors have been carefully considered and weighed. The fine should be reduced as appropriate for any plea of guilty. After that the court should consider whether it needs also to impose a publicity order and a remedial order.

Research conducted for the Centre for Corporate Accountability showed that the majority of large companies convicted of health and safety offences involving a death of a worker or member of the public were fined at a level which was less than one 700th of their annual turnover. If individuals earning an average annual income of £24,769 were sentenced at this level, they would have been fined £35 for manslaughter. It will be interesting to see how far the implementation of the new sentencing guideline creates a more punitive regime when companies kill.

While several companies identified by the Centre for Corporate Accountability as the worst repeat-offenders in cases of corporate killing had turnovers in hundreds of billions, the remarkably good Centre became defunct last year through lack of funding. We shall, therefore, be hearing less about corporate delinquency in future.